STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Sage Telecom	)	
	)	
Petition for Arbitration of an Interconnection Agreement	)	**03-0570**
with Illinois Bell Telephone Company (SBC Illinois)	)	
under Section 252(b) of the Telecommunications Act of 1996	)	

BRIEF ON EXCEPTIONS OF SAGE TELECOM, INC.

Henry T. Kelly
Joseph E. Donovan
KELLEY DRYE & WARREN LLP
333 West Wacker Drive, Suite 2600
Chicago, Illinois 60606
(312) 857-7070
(312) 857-7095 facsimile
HKelly@kelleydrye.com
Jdonovan@kelleydrye.com

Attorneys for Sage Telecom, Inc.

PUBLIC VERSION
**PROPRIETERY DATA CONTAINED IN ** **

Filed: December 1, 2003

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Sage Telecom	)	
	)	
Petition for Arbitration of an Interconnection Agreement	)	**03-0570**
with Illinois Bell Telephone Company (SBC Illinois)	)	
under Section 252(b) of the Telecommunications Act of 1996	)	

BRIEF ON EXCEPTIONS OF SAGE TELECOM, INC.

COMES NOW Sage Telecom, Inc., by and through its attorneys Kelley Drye & Warren, LLP, pursuant to the directives of the Administrative Law Judge and 83 Ill. Admin. Code Part 261.10 et seq., and files this Brief on Exceptions to the Proposed Arbitrator's Decision ("PAD") in the above captioned proceeding.

I. SAGE EXCEPTION 1 (P. 6-8)

THE PROPOSED ARBITRATOR'S ORDER INCORRECTLY FINDS THAT THE INTERCONNECTION AGREEMENT SHOULD INCLUDE BILLING AND COLLECTION TERMS. (p. 7-8)

Sage has argued since the inception of this proceeding that this Commission should not impose ABS terms and conditions in a regulated Section 252 ICA. Sage has established that since 1986, the FCC held that billing and collection is a nonregulated service that does not fall under the province of the FCA. There is no reason why an interconnection agreement governed by the FCA should be encumbered with the nonregulated billing and collection services. Rather, the parties should negotiate such terms outside the realm of a Section 252 ICA.

In a fundamentally unsupportable conclusion, the PAD finds that ABS terms and conditions can and should be included in the ICA. *Id*., at p. 6-7. Further, in order to support this conclusion, the PAD expressly rejects the conclusion reached by the Texas and Michigan Commissions on this very issue wherein those Commissions applied FCC orders and held that billing and collection terms are a nonregulated service that should not be incorporated into a Section 251 interconnection agreement. The PAD further rejects the "valid concerns" contained in the Texas Commission's order, finding that those concerns to not trouble this Commission. According to the PAD, the Commission can accord greater weight to the benefits that SBC predicts from inclusion of ABS billing and collection terms in the Sage-SBC agreement. *Id*. Further, the PAD holds that, because Sage has entered into interconnection agreements in other states that contain general billing and collection terms, it is appropriate to also do so in this proceeding. *Id*., at p. 8.

Unfortunately, each of these so-called reasons for including billing and collection terms misses the point – billing and collection terms are expressly and unquestioningly not regulated under the auspices of the Federal Communications Act! No matter how hard the PAD ignores that simple fact, it does not go away. There is no reason why nonregulated services should be jammed into an interconnection agreement governing regulated services. Sage presents two other state commissions that have specifically held that such terms should not be included in such an agreement, but the PAD fails to provide a single citation to any state order that has reviewed the issue and held that such nonregulated terms should be incorporated into a Section 252 agreement. In short, it appears that, if the PAD is adopted by the full commission, the ICC would be the only state commission that has forced nonregulated billing and collection terms into an agreement governing regulated services. Further, whether Sage has entered into other

agreements in other states is not relevant as neither agreement cited includes any terms that would force Sage to be liable for a single penny of SBC's ABS charges.

1. Under the Federal Communications Act, billing and collection is not a regulated service and should not encumber an interconnection agreement governing services that are actually subject to the Act.

It is undisputed that the FCC has specifically held that billing and collection services do not employ wire or radio facilities and do not allow customers of the service to "communicate or transmit intelligence of their own design and choosing. … In short, billing and collection is a financial and administrative service."[1] On this basis, the FCC held that "***billing and collection services provided by local exchange carriers are not subject to regulation under Title II of the [Federal Communications] Act***." *Id*., at ¶ 34. The FCC went on to hold that it will not assert any ancillary jurisdiction over billing and collection services under Title I of the Federal Communications Act, as well.[2]

Thus, since 1986, the Federal Communications Act ("FCA") has not conveyed any jurisdiction for billing and collection services. Notwithstanding the clear lack of jurisdiction under the FCA, the PAD imposes into the interconnection process for those services that are regulated under the FCA by demanding Sage insert language in its Interconnection Agreement related to nonregulated billing and collection services. Because billing and collection is an unregulated service that isn't even subject to the scope of the FCA, there is no sustainable reason why an interconnection agreement negotiated pursuant to the FCA and detailing the interconnection of regulated telecommunications services between SBC and Sage should be hindered with SBC's proposed ABS Appendix.

---

1 *In the Matter of Detariffing of Billing and Collection Services*, FCC Docket No. 85-88, Report and Order, 102 FCC.2nd 1150, ¶ 32 (rel. January 29, 1986).

2 *Id*., at ¶ 37.

The PAD ignores this threshold argument, however, and finds that it is appropriate to include nonregulated billing and collection terms in the agreement. It does so, however, with no citation or explanation as to how it can assert jurisdiction over these unregulated services. This failure, in and of itself, is fundamentally fatal to the PAD's decision. The PAD does not provided a single FCC or state commission order that reverses the determination that billing and collection services are not regulated under the FCA – nor can it do so. In short, the determination made in 1986 stands strong today and any attempt to re-regulate these services under the guise of a Section 252 interconnection agreement is wholly inappropriate. The Commission should reject the PAD's determination for this reason alone.

a. At least two other state commissions facing the same issues currently pending before this Commission have held that terms related to the unregulated billing and collection for ABS traffic should not be included in the Section 252 interconnection agreements.

Sage finds it interesting that the PAD specifically relies upon the Michigan interconnection agreement in support of its finding that billing and collection terms for ABS services should be included in the Illinois agreement. PAD, at p. 7-8. This is especially interesting because the Michigan Commission not only rejected the adoption of SBC's proposed ABS Appendix, but held that no billing and collection terms should be incorporated into an interconnection agreement governed under the FCA! Despite this indisputable fact, the PAD still finds that the Michigan interconnection agreement provides foundation for inserting ABS billing and collection terms in the Illinois interconnection agreement. This inconsistency cannot be justified.

As explained above, this proceeding is not the first time that a dispute has arisen related to the billing and collection role of CLECs for SBC's ABS services. SBC has also attempted to lay the burden of guaranteeing its revenues on the shoulders of CLECs in both Texas and

Michigan by including its ABS Appendix in a Section 252 interconnection agreement. Importantly, both Commissions held that including billing and collection language in the interconnection agreement was inappropriate. For instance, in the *Michigan MCI Arbitration* case,[3] SBC proposed the same ABS Appendix it initially offered to Sage in this negotiation process in order to set forth the terms and conditions for ABS billing and collection for UNE-P ABS traffic.[4] Just like Sage in this proceeding, MCI argued that the entire appendix should be omitted because the ABS Appendix constitutes unregulated billing and collection services that are not required to be part of an interconnection agreement governed by the FCA. *Id*., at p. 46-47. Importantly for this Commission's review of the issue, the Michigan Commission held that "[Alternate Billed Service] is an unregulated billing and collection service, the terms of which may be worked out by the parties ***without the need for Arbitration as part of the Interconnection Agreement***."[5]

And the Michigan Commission is not alone in that finding. In facing this same issue, the Texas Commission held that "[ABS] matters over the UNE platform should be addressed in a separate billing agreement between parties ***and should not be incorporated into an interconnection agreement***." *Texas Revised Arbitration Order*, at p. 212.[6]

---

3 *In the Matter of the Petition of Michigan Bell Telephone Company, d/b/a SBC Michigan, for arbitration of the interconnection rates, terms, and conditions, and related arrangements with MCIMetro Access Transmission Services, LLC, pursuant to Section 252(b) of the Telecommunications Act of 1996*, Case No. U-13758, Opinion and Order (August 18, 2003) ("*Michigan MCI Arbitration Order*") (relevant portions of which were attached as Exhibit 4 to the Petition for Arbitration).

4 *Id*., at p. 46.

5 *Id*., at p. 47.

6 *Petition of MCIMetro Access Transmission Services, LLC, Sage Telecom, Inc., Texas UNE-P Coalition, McLeod USA Telecommunications Services, Inc. and AT&T Communications of Texas, L.P. for Arbitration with Southwestern Bell Telephone Company Under the Telecommunications Act of 1996*, PUCT Docket No. 24542, Revised Arbitration Award at 212 (Oct. 3, 2002) ("*Texas Arbitration Award*") (relevant portions of which were attached to the Petition for Arbitration as Exhibit 8)..

Unfortunately, the PAD ignores these findings and adopts SBC's position that this Commission somehow has jurisdiction under the FCA over services that the FCC does not. This is improper. Further, there is no reason why this Commission should adopt a policy any different than its fellow commissions in Texas and Michigan. Billing and collection services are clearly a nonregulated service not within the realm of the FCA. As staff acknowledges, the interconnection agreement process is governed by Section 252 of the FCA. As the Texas and Michigan Commissions held, such services should be the subject of agreements outside the scope of the Section 252 interconnection process.

b. SBC and Sage have already developed standard business practices that govern the manner in which the parties bill and collect for ABS charges outside the realm of a Section 252 interconnection agreement.

The record before the Commission also shows that SBC and Sage have developed just such a process for billing and collection outside the scope of the Section 252 process. As discussed above, the issue of billing and collection for ABS services has already been litigated in other jurisdictions. In Texas, the first state commission to address the issue of liability for ABS charges that remain uncollected, Sage filed a complaint disputing the ABS charges for which SBC was continuing to bill Sage. The Texas Commission issued an interim order[7] in Sage's complaint proceeding and then decided the final merits on the ultimate issue (i.e., finding that Sage only serves as SBC's billing and collection agent and bears no financial responsibility for

[7] *Complaint of Sage Telecom, Inc. Against Southwestern Bell Telephone Company for Implementation of Billing Procedures for Incollect Calls*, PUCT Docket No. 24593 (filed Sept. 4, 2001). On October 15, 2001, the Texas Commission issued an Order on Interim Relief in PUCT Docket No. 24593 ("Texas Interim Order") and consolidated Sage's Complaint with and ultimately decided on the merits of the complaint in PUCT Docket No. 24542, *Petition of MCIMetro Access Transmission Services, LLC, Sage Telecom, Inc., Texas UNE Platform Coalition, McLeod USA Telecommunications Services, Inc. and AT&T Communications of Texas, L.P. for Arbitration with Southwestern Bell Telephone Under the Telecommunications Act of 1996*. A copy of the relevant portions of the Revised Arbitration Award issued on October 3, 2003 in Docket No. 24542 was attached as Exhibit 8 to the Petition for Arbitration.

uncollectible amounts) in a larger arbitration involving many parties, including Sage. In the *Texas Interim Order*, the Texas Commission held as follows:

> (1) Sage is required to bill its end-user customers using the SBC rated DUF records for ABS;
> (2) Sage is required to implement a tracking system for billing and collections for ABS calls;
> (3) for the amounts of ABS charges that are collected as a result of the bills, Sage is required to pay SBC those amounts as soon as practical; the payment requirements under the Interconnection Agreement are suspended for ABS (*e.g.,* the 30-day payment period);
> (4) Sage will make good faith efforts to collect the ABS amounts billed to its end-user customers; and,
> (5) in the event that a Sage customer falls into arrears more than 60 days for ABS calls, Sage is to notify SBC. SBC may elect to block all collect calls to that end-user.

When the Texas Commission issued its interim order with the above findings, Sage and SBC worked on implementing those decisions through business-to-business discussions. As SBC witness Smith acknowledges, these discussions resulted in a number of business practices that the two parties have implemented that govern the billing and collection for ABS services – business practices that the two parties have adopted in each of the ten SBC states in which Sage operates. Tr., at pp. 196-198. Those business practices are the norm between the two companies and govern the relationship and obligations with respect to ABS billing and collections. Sage and SBC have worked to take care of issues as they arise. Importantly, while these business practices were initiated as a result of the *Texas Interim Order*, the day-to-day business practices that govern the billing and collections are not the result of regulatory prodding or Section 252 interconnection agreements.

Just as important, however, is the fact that even SBC agrees that Sage has met its obligations under the *Texas Interim Order* and *Texas Revised Arbitration Order* with respect to billing and collection of ABS charges. In fact, according to SBC, it is "pleased with the progress and cooperation that has been made in developing business practices with Sage in regards to

ABS." SBC Ex. 1.0, at p. 24 (Smith Direct). As SBC witness Smith attests to in his cross examination, Sage has satisfactorily completed all of the obligations listed above under the *Texas Interim Order*. Tr., at pp. 198-199. Mr. Smith goes on to admit that Sage is blocking ABS traffic on particular customers when SBC asks that it do so. Tr., at p. 205. In short, SBC admits that Sage has complied with the requirements imposed upon it by the Texas Commission.

However, the PAD ignores the evidence of these business practices. In fact, the PAD is completely silent as to their existence in any of its conclusion paragraphs; but these business practices simply cannot be ignored. It is these business practices, governed by agreements of the parties separate and aside from their respective interconnection agreements that should govern the billing and collection practices between the parties. The process has worked in ten states in which Sage provides service, and as SBC's own witness points out, both parties "are pleased with the progress and cooperation." SBC Ex. 1.0, at p. 24 (Smith Direct).

Notwithstanding such progress and cooperation, the PAD proposes the Illinois Commission enter an order making this the only state that will input the terms and conditions associated with billing and collections for ABS services into a Section 252 interconnection agreement. Such a position is in direct conflict with close to twenty years worth of FCC precedent with respect to the FCA's jurisdiction over billing and collection services. Such a conclusion is also in conflict with the business practices developed by SBC and Sage over the last several years.

c. Sage remains ready and willing to negotiate and enter into a billing and collection agreement with SBC outside the scope of the regulated Section 252 interconnection agreement.

To be clear, Sage has always been ready and willing to proceed with negotiations and enter a billing and collection agreement with SBC that contains mutually acceptable terms and

conditions negotiated free from the regulatory regime of the Section 252 interconnection agreement process. In fact, the evidence shows that is just the process that Sage has followed with dozens of other carriers with which it has entered into such billing and collection agreements. The record demonstrates amply the existence of such negotiated agreements governing the billing and collection roles and negotiated outside the scope of the interconnection process. *See*, Sage Ex. 2.0, Attachment B (compilation of various agreements entered into between sage and other carriers).

The record also demonstrates that SBC itself has entered into numerous such billing and collection agreements with both its affiliates and third party IXCs that govern the process by which the SBC local exchange affiliate bills and collects for services rendered by the affiliate, also outside the context of arbitrated interconnection agreements. SBC witness Smith discussed the existence of billing and collection agreements between it and other third parties like MCI. *See*, e.g. Tr., at p. 181, 200 (SBC witness Smith discussing agreements between SBC and various IXCs and its long distance affiliate). Further, the record provides an example of the standard SBC affiliate billing and collection agreement pursuant to which SBC local exchange affiliates will bill and collect its customers on behalf of SBC's advanced services affiliates. *See*, Sage Ex. 2.0, attachment A (Timko Rebuttal). Unlike the ABS Appendix that the PAD inserts into the Section 252 interconnection agreement, however, SBC admits that none of these IXC or affiliate billing and collection contracts were submitted to any commission for approval under Section 252 of the FCA. Tr., at p. 163. Importantly, in this SBC affiliate agreement, SBC's local exchange affiliate is given the ability to fully recourse **100%** of any uncollectibles back to its data affiliate. In other words, SBC's local exchange affiliates are ***NOT*** held financially liable when its customers refuse to pay the SBC data affiliate charges. Unfortunately, SBC does not

provide Sage with similar treatment, as the ABS Appendix adopted by the PAD imposes financial responsibility on Sage for at least 65% of SBC's ABS revenues charges that remain unpaid by the end-user.

Despite this inherent favoritism bestowed by SBC on its affiliates and SBC's unwillingness to grant those same terms to Sage, Sage remains amenable to negotiating outside the scope of a regulated Section 252 agreement terms and conditions governing billing and collection of SBC's ABS services. The PAD, however, incorrectly asserts these unregulated services into the agreement, a decision that must be rejected by the Commission upon its review.

2. The PAD compares apples to oranges in relying on interconnection agreements from other states that may contain billing and collection terms, as neither agreement forces Sage to be financially liable for SBC's ABS charges.

In support of its conclusion to include nonregulated billing and collection terms in a regulated interconnection agreement, the PAD relies on its assertion that the parties entered into agreements in Wisconsin and Michigan that also contain billing and collection terms and, as such, it would be appropriate to do so here as well. PAD, at p. 7-8.

While Sage acknowledges that the Wisconsin and Michigan agreements contain terms similar to the language that Sage proposed in Section 27.16.3 of the agreement in this proceeding, reliance on these other state agreements is still improper. Frankly, whether Sage has "repeatedly and voluntarily included ABS billing and collection terms" in the other state's agreements is only one layer of the analysis. The PAD overlooks the fact that neither the Wisconsin nor the Michigan agreements cited and relied upon have any terms whatsoever that would impose financial responsibilities on Sage related to SBC's ABS charges. In fact, as discussed above, the Michigan Commission specifically rejected adopting an ABS Appendix in the interconnection agreement.

Consistent with its arguments throughout this proceeding, Sage is willing to serve as a billing and collection agent on behalf of SBC for SBC's ABS charges, but it cannot and should not be held to be financially liable for a single penny of SBC's revenues. This is consistent with the business practices established by Sage and SBC over the last few years. This is consistent with the Texas and Michigan orders rejecting SBC's ABS Appendix. Further, and perhaps even more important, it is consistent with the very Wisconsin and Michigan agreements relied upon by the PAD. As neither of these agreements impose any financial liability for SBC's ABS revenues, the Commission cannot rely upon them to support any finding that they support imposing such liability. Building upon that business practice between the parties, Sage proposed language in this proceeding that gives SBC a billing and collection agent, while at the same time frees Sage from the unjustified financial liability for SBC's ABS charges.

The PAD takes a radical departure from that premise and creates an entirely new framework governing the two companies' relationship. It is untenable for the PAD to rely on two agreements in other states that do not impose any financial responsibility on Sage for SBC's ABS revenues in support of adopting an agreement wherein the Commission would impose substantial financial risk on Sage for the same ABS revenues is untenable. The Commission should reject this analysis and hold that inclusion of billing and collection terms in a regulated interconnection agreement governed by the very same Federal Communications Act that removes jurisdiction over billing and collection is not appropriate. By so doing, the Commission can be assured that it has adopted an order that is consistent with the Federal Communications Act, as well as the business practices that both SBC and Sage have developed over the course of several years.

a. The Commission should find that billing and collections are a nonregulated service under the FCA and should not be included in an interconnection agreement that governs services that are regulated under the FCA by rejecting SBC's proposed ABS Appendix.

No party can dispute the FCC's finding that billing and collection terms are nonregulated under the FCA. Further, no party can dispute the fact that the interconnection agreement at issue in this proceeding is subject to and governed by Section 252 of the FCA. In fact, the PAD correctly concludes that Section 252 governs the interconnection agreement process. PAD, at p. 2. In spite of this unquestioned lack of jurisdiction over billing and collection services under the FCA, the PAD still mandates the imposition of billing and collection terms in the interconnection agreement process governed by that very same FCA. Such a conclusion is unlawful.

Further, it is apparent that SBC also agrees that billing and collection terms should not be included in the Section 252 interconnection agreements, as it admits that none of the billing and collection agreements it has entered into between its local exchange affiliates and its other affiliates have ever been submitted to any commission for approval under Section 252. This is not a distinction without a difference. Under those affiliate billing and collection agreements, the local exchange affiliate is given the ability to fully recourse **100%** of any uncollectibles back to its data affiliate. The PAD, however, ignores this evidence in the record and forces Sage to guarantee at least 65% of SBC's ABS revenues. Such a finding is discriminatory against Sage and must be rejected.

This Commission must reject the PAD's conclusion and hold that it is inappropriate to include such terms and conditions in the interconnection agreement. As such, the Commission must find for Sage and, like its fellow commissions in Michigan and Texas, hold that "[ABS] matters over the UNE platform should be addressed in a separate billing agreement between parties and should not be incorporated into an interconnection agreement."

In particular, Sage recommends the following modifications to the PAD:

- Delete pages 7-19 of the PAD, and replace with the following:

> "This Commission agrees with our fellow Commissions in Texas and Michigan that inclusion of nonregulated billing and collection terms for SBC's ABS services as outlined in SBC's proposed ABS Appendix is inappropriate in the context of an interconnection agreement governed by Sections 251 and 252 of the FCA. It is undisputable that the FCC has held that billing and collection services are not within the province of the FCA, and we see no reason this Commission should come to a conclusion at odds with the FCC on this issue. We note that Sage has agreed to enter into negotiations with SBC outside the realm of a Section 252 ICA to address the issues, and that the parties have already adopted standard business practices governing the billing and collection process in all ten of the other states in which Sage operates. Certainly, the parties are free, and we encourage them, to negotiate such billing and collection terms outside the scope of an interconnection agreement governed pursuant to the FCA. However, we will not impose such terms as a part of the ICA.
>
> In point of fact, the record evidence demonstrates that not only has Sage negotiated and entered into a number of such agreements governing billing and collection terms, but so has SBC. *See*, Sage Initial Brief, pp. 17-18 and citations therein. We see no reason why it should be any different under these circumstances. As such, we hold that billing and collection terms related to SBC's ABS charges should not be included in the Section 252 interconnection agreement at issue herein. Further, in light of the conclusion reached herein, it is not necessary for us to evaluate the various proposed ABS billing and collection language.

II. SAGE EXCEPTION 2 (P. 13-14)

THE PAD IMPROPERLY PLACES THE FINANCIAL BURDEN OF GUARANTEEING SBC'S ABS REVENUES ON SAGE BY REJECTING SAGE'S PROPOSED LANGUAGE LIMITING ITS ROLE TO THAT OF BILLING AND COLLECTION AGENT ONLY.

The PAD explains that, even though it is SBC that determines the ABS charges and reaps the financial proceeds of ABS traffic (PAD, at p. 13-14), the allocation of responsibility for uncollectible charges should be shared between Sage and SBC. The PAD also completely rejects the sound decisions of the Texas Commission which specifically held that SBC should be fully responsible for all of its own revenues. *Id*. In the end, the PAD held that Sage should be forced to accept financial responsibility for SBC's ABS charges originated through SBC and

rejects Sage's proposal to limit its liability to that of billing and collection agent only. *Id*., at p. 14. Such a determination is unsustainable and in direct conflict with the evidence on record.

As Sage has explained in its testimony and briefs, there is no sustainable reason to impose any financial obligations on it with respect to SBC's ABS revenues. In fact, the evidence submitted in this proceeding (but ignored in the PAD) would support the exact opposite conclusion than that reached in the PAD – that Sage should not be responsible for a single penny of SBC's ABS revenues. It is indisputable that Sage has no role in the completion of an ABS call from SBC or any other third party. Notwithstanding, the PAD would have Sage be a financial guarantor for at least 65% of SBC's revenues for ABS calls terminated to Sage end users. This decision is directly counter to the mounds of evidence in this record that supports Sage's argument that it should be no more than an agent for purposes of billing and collecting of SBC's ABS charges.

1. While on one hand the PAD concludes that it is SBC that determines the charges and reaps the financial proceeds for ABS calls, the PAD still concludes that Sage should be financially liable for those very same charges.

The record is indisputable that Sage takes no part in the completion of an ABS call, even if that call terminates on a Sage end user. Neither Staff nor SBC has asserted otherwise. This evidence, however, is utterly ignored in the PAD. The evidence is clear and unrebutted that SBC and the terminating end user (even though that end user may use Sage as its local exchange provider) have entered into a business relationship with respect to that ABS call. The analysis really is not more complicated than whether the end user and SBC have entered into a contractual relationship for the handling of the ABS call. Based upon the evidence in this record, it is clear that there is an offer, acceptance and consideration in order to establish a contractual relationship between SBC and the party who authorizes the ABS call.

"A contract, to be valid, ***must contain offer, acceptance, and consideration***; to be enforceable, the agreement must also be sufficiently definite so that its terms are reasonably certain and able to be determined." *Halloran v. Dickerson*, 287 Ill.App.3d 857, 867-68, 679 N.E.2d 774 (1997), citing *Ogle v. Hotto*, 273 Ill.App.3d 313, 319, 652 N.E.2d 815 (1995). "A contract is sufficiently definite and certain to be enforceable if the court is able from its terms and provisions to ascertain what the parties intended, under proper rules of construction and applicable principles of equity." *Halloran*, 287 Ill.App.3d at 868, 679 N.E.2d 774, citing *Midland Hotel Corp. v. Reuben H. Donnelley Corp.*, 118 Ill.2d 306, 314, 515 N.E.2d 61 (1987).

The evidence ignored in the PAD supports the position that SBC and the end user (not Sage) have entered into a contract with respect to the ABS call. The syllogism is quite simple:

1. SBC contacts the end user and offers to complete the Incollect ABS call on the condition that the end user will agree to SBC's terms and pay SBC the tariffed rate for completing that ABS call;
2. The authorization to accept the call is made through SBC's operator service platform and it is SBC that receives the verification of the authorization (Tr, at pp. 370-371);
3. The end user either rejects the offer to complete the ABS call and no contract exists, or accepts SBC's offer and agrees to pay SBC the SBC-tariffed rate for completing the call (Tr., at p. 371-372);
4. There is an offer, there is acceptance of that offer, and there is consideration paid by both parties. In short, there is a contractual relationship between that end user and SBC.

These are the only elements that are required to enter into a binding contract in Illinois. *Halloran*, 287 Ill.App.3d at 867-868. Thus, the evidence demonstrates the fact that SBC and the end user who accepts SBC's offer to complete the ABS call do, in fact, have a contractual relationship.

Importantly, the evidence also shows that Sage is not even a party to the contract nor even aware of the existence of the contract until well after execution (i.e., when Sage receives and processes the DUF records for billing). In short, the ABS call is originated on an SBC phone

by a customer using SBC's ABS calling services, is run through the SBC operator services and the SBC network, is rated at SBC's tariffed rates and passed directly through to the terminating party, who then authorizes the call to the SBC operator. Sage is never consulted or even notified of the call. In fact, it is undisputed in the record that Sage is not even made aware of the ABS call until well after both parties have hung up, SBC has forwarded the Daily Usage Feed to Sage and Sage has processed its contents. Sage Ex. 1.0, at p. 20 (Timko Direct). Further, SBC admits on cross that it does not consult with Sage to get its approval for the ABS charge either before, during or after the call. Tr., at p. 405. Notwithstanding Sage's lack of privity to the contract, the PAD forces Sage to be financially liable for the charges SBC has incurred due to its contract with the end user. This is simply inappropriate.

2. The PAD's rejection of the Texas Commission's order related to ABS charges is based upon evidence not in this record.

In a proceeding before the Texas Commission, SBC also attempted to impose an ABS Appendix containing billing and collection terms into an interconnection agreement. The Texas Commission, unlike the PAD, rejected SBC's attempt to do so and held that "[ABS] matters over the UNE platform should be addressed in a separate billing agreement between parties and should not be incorporated into an interconnection agreement**."** *Texas Revised Arbitration Order*, at p. 212. As noted in the PAD, the Texas Commission also held that SBC, and not Sage, should bear 100% of the financial responsibility for ABS uncollectibles. PAD, at p. 13.

Unfortunately, the PAD fails to adopt the Texas Commission's rationale. Rather, as the single reason for disputing the Texas decision, the PAD finds that the situation differs in that the Texas Commission did not have "evidence of Sage's utterly unsatisfactory record regarding collection of ABS charges." *Id*. With all due respect, this Commission has no more evidence of Sage's collection rate than the Texas Commission, as the record in this proceeding also fails to

contain any evidence of Sage's record regarding collection of ABS collection. The PAD's conclusion is groundless as there is not a single document or other piece of evidence in this record that demonstrates evidence that Sage has any record, much less an unsatisfactory record, related to ABS charges. In short, the record is void of any evidence that support the PAD's conclusion with respect to Sage's collection history.

The only possible hook for the PAD to hang its hat on in support of this determination is SBC witness Ms. Burgess' unsupported, undocumented, and unfounded assertion as to what she claims Sage's record to be. Neither Ms. Burgess nor SBC provided any documents that would support such a claim, nor does the PAD cite to any such evidence. Simply put, the PAD cannot reasonably rely on such unfounded assertions. "[T]he findings of such administrative agency must be based on facts established by evidence which is introduced as such …" *Wheeler v. County Board of School Trustees of Whiteside County*, 210 N.E.2d 609, 610 (Ill. Ct. App., 3rd Dist, 1965). As SBC has failed to provide any actual evidence in support of its claims, the PAD cannot rely upon the assertions in order to reach a finding of fact or law. Further, the Commission cannot rely upon these unsupported assertions as its determinations "must be based on facts established by evidence which is introduced as such …" *Wheeler*, 210 N.E.2d at 610.

3. The Commission should find that Sage should be no more than a billing and collection agent on behalf of SBC with respect to SBC's ABS charges.[8]

For the above reasons, the Commission should reject the PAD's proposed findings on pages 13 and 14, and instead, affirm that Sage cannot and should not be forced to be financially

[8] As stated above, Sage believes that the Commission must find that ABS billing and collection terms are not appropriate in a Section 252 interconnection agreement. As a threshold matter, this second and subsequent exceptions are only applicable in the event that the Commission rejects Sage's first argument that it is improper to insert any nonregulated billing and collection terms for ABS services in a Section 252 interconnection agreement. As such, Sage will provide exceptions and proposed language for these exceptions, but does not believe the issue even need be addressed in the final Commission order as adoption of Sage's arguments in Exception 1 above will fully address the outstanding issues.

liable as a guarantor to SBC for SBC's ABS revenues. There simply is no record evidence to support such a decision. In converse, however, there is ample evidence to support Sage's position that it should only be an agent and not be stuck with any financial liability when SBC contracts with an end user to terminate an ABS call.

In particular, Sage recommends the following modifications to the PAD:

- Delete the Commission's Analysis and Conclusions section on pages 13-19, and replace with the following:

> It is clear from our review of the evidence that Sage has no role whatsoever in the marketing, solicitation, rating, tariffing, offer, acceptance or completion of the ABS traffic at issue. Rather, as Sage points out, the evidence indicates that it is SBC who performs such functions. As such, much like the Texas Commission we find that it is SBC who should face the liability for those charges. As we have held that billing and collection terms are appropriate under the ICA, we find that Sage's proposed language to be added to Article VI, Section 6.3.4.1 of the ICA is appropriate and should be included in the final interconnection agreement.
>
> Initially, we must discard SBC's assertion that it does not have a business relationship with the Sage end user who accepts the ABS call. This simply is not the case. As Sage points out, SBC in fact has a contractual relationship with that end user. SBC offers to the end user to terminate the ABS call in exchange for the end users agreement to pay SBC for the service; the end user agrees to those terms; SBC terminates the call. It is clear there exists all of the necessary terms of a contract between SBC and the end user. Importantly, the evidence also shows that Sage is not even a party to the contract nor even aware of the existence of the contract until well after execution (i.e., when Sage receives and processes the DUF records for billing). In short, the ABS call is originated on an SBC phone by a customer using SBC's ABS calling services, is run through the SBC operator services and the SBC network, is rated at SBC's tariffed rates and passed directly through to the terminating party, who then authorizes the call to the SBC operator. Sage is never consulted or even notified of the call. In fact, it is undisputed in the record that Sage is not even made aware of the ABS call until well after both parties have hung up, SBC has forwarded the Daily Usage Feed to Sage and Sage has processed its contents. Sage Ex. 1.0, at p. 20 (Timko Direct). Further, SBC admits on cross that it does not consult with Sage to get its approval for the ABS charge either before, during or after the call. Tr., at p. 405. Rather, SBC's tariff requires that SBC get that approval for the call from the customer, not Sage. Sage Cross Ex. 1. As Sage is neither consulted with nor even knowledgeable of the ABS charges, Sage cannot be deemed the "responsible" party for the charge.
>
> We also note that, while certainly not binding on this Commission, such a conclusion is in line with the manner in which the Texas Commission has dealt with the issue. The Texas Commission held that that Sage "should not be responsible or liable to SWBT for any Incollect [i.e., ABS] charges that are uncollectible." *Texas Revised*

Arbitration Award, Exhibit 8 to Sage's Petition, at p. 212. We find no basis in the evidence before us that would warrant any other conclusion. SBC attempts to make claims regarding what it purports to be Sage's uncollectible rate in other jurisdictions, SBC's uncollectible rates, and what SBC claims to the industry standard for uncollectibles. However, SBC failed to provide this Commission with any evidence, documentation or other foundation for any of these assertions. We agree with Sage that we are bound by the requirements of the Illinois Administrative Procedures and our own rules, which require us to make our findings based upon the record evidence before us. "[T]he findings of such administrative agency must be based on facts established by evidence which is introduced as such …" *Wheeler v. County Board of School Trustees of Whiteside County*, 210 N.E.2d 609, 610 (Ill. Ct. App., 3rd Dist, 1965). As SBC has failed to provide any actual evidence in support of its claims, the PAD cannot rely upon the assertions in order to reach a finding of fact or law. SBC's failure to provide such basic foundation for these assertions precludes us from giving them any weight.

The evidence before us does, however, indicate the negative impact on Sage if we were to impose financial liability on it for SBC's ABS revenues. For instance, it is undisputed that such an imposition will have serious impact on the financial wherewithal of Sage. *See*, Sage Ex. 1.0, at p. 27-29 (Timko Direct). The evidence shows that forcing Sage into being financially liable to SBC will force Sage to have to pay an extraordinary amount of cash to SBC up front, which will obviously have a negative affect on Sage's cash flow position. *Id*., at p. 27. Sage may not be able to collect these charges, particularly those that are very high, or obtained by persons that are no longer Sage's customers. Even for those amounts that Sage is able to collect, Sage would not receive those monies until after Sage has been required to pay SBC's invoice for the full amount. Thus, again, there will be a negative cash flow to Sage. The bottom line is that making Sage liable for SBC's Incollect charges forces Sage to subsidize SBC's customers and its business deals with third party carriers and their affiliates. Further, the evidence shows that SBC invoices are shown as liabilities on Sage's books, for which Sage will likely not be able to recover 100% from the end-use customers. *Id*. As such, Sage will have to show the liability as part of its income statement that it uses to secure financing and investors. Because of the time delay in recouping incollect charges versus the deadline for payment to SBC, there will be a significant detrimental impact to Sage's audited financials such as revenues and margin percentages, negative cash flow, false receivable balances (since Sage may never recover some of the incollect charges that it would be forced to pay SBC under an invoice), and bad debt ratios. We find these financial concerns should no longer be an issue due to our decision to limit Sage's role to that of SBC's billing and collection agent only, and not financially liable for SBC's revenues.

Accordingly, the Commission resolves Sage issue 2 by agreeing with Sage that its role should be limited to that of a billing and collection agent only for SBC's ABS charges. The evidence in this record strongly supports this conclusion. We adopt Sage's proposed language in Article VI, Section 6.3.4.1 expressly limiting Sage's role to that as a billing and collection agent only and clarifying that Sage is not liable for any SBC ABS revenues. As such, we need not address the terms of the various ABS Appendices proferred.

III. SAGE EXCEPTION 3 (p. 15-19)

THE PAD IMPROPERLY ADOPTS THE TERMS OF THE SBC-PROPOSED ABS APPPENDIX AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED.

Sage takes exception to the PAD's conclusions with respect to the insertion of the SBC ABS Appendix terms in the Section 252 interconnection agreement. As a threshold matter, this issue is only applicable in the event that the Commission rejects Sage's first exception that it is improper to insert any nonregulated billing and collection terms for ABS services in a Section 252 interconnection agreement and second exception with respect to Sage's limitation of financial liability outlines above. As such, Sage will provide exceptions and proposed language for this exception, but does not believe the issue even need be addressed in the final Commission order as adoption of Sage's arguments in Exceptions 1 or 2 above will fully address the outstanding issues.

1. SBC Options 2 and 3 cannot be adopted, as the record does not contain any evidence or foundation to support SBC's purported uncollectible rate.

In a correct and proper conclusion, the PAD rejects SBC's purported "industry average" uncollectible rate of 15–20% because the "record does not contain a basis for determining whether SBC's 15-20% range is derived from data that would have to be assembled to calculate that average." PAD, at p. 17. In other words, SBC failed to provide any record evidence to support its purported average industry uncollectible rate. Sage agrees.

However, in an internally inconsistent conclusion, the PAD errs in the next paragraph by somehow finding that SBC's claimed 10-20% bad debt rate for ABS calls is valid. Such is not the case, as it cannot be disputed that the PAD's reliance on SBC's claims suffers the very same

fatal error as the "industry average" percentage specifically rejected by the PAD in the proceeding paragraph – SBC did not present a single piece of evidence in the record that supports its purported percentage! As with the "industry average" in the proceeding paragraph, the "record does not contain a basis for determining whether SBC's [10-20]% range is derived from data that would have to be assembled to calculate that average."

It is beyond question that such record support is necessary in order for the Commission to make such a conclusion. "[T]he findings of such administrative agency must be based on facts established by evidence which is introduced as such …" *Wheeler v. County Board of School Trustees of Whiteside County*, 210 N.E.2d 609, 610 (Ill. Ct. App., 3rd Dist, 1965). As SBC has failed to provide any actual evidence in support of its claims, the PAD cannot rely upon the assertions in order to reach a finding of fact or law. Illinois courts have long held that a witness's opinion testimony is only as valid as the factual reasons and bases for the opinion. *See*, e.g. *Hiscott v. Peters*, 324 Ill.App.3d 114, 123 754 N.E.2d 839 (2001).

> the trial court is not required to blindly accept the expert's assertion that his testimony has an adequate foundation. Rather, ***the trial court must look behind the expert's conclusion and analyze the adequacy of the foundation***." *Id*., quoting, *Soto v. Gaytan*, 313 Ill.App.3d 137, 146, 728 N.E.2d 1126 (2000).

A witness's opinions cannot be based on mere conjecture and guess. *Id*., quoting, *Dyback v. Weber*, 114 Ill.2d 232, 244, 500 N.E.2d 8 (1986). Here, the PAD adopts SBC alleged uncollectible rate, but utterly fails to provide any record foundation for, nor any citation to, such a decision. The PAD ignores this vacuum in the record, which leads to a finding that is not supported by the record evidence.

Further, the PAD describes SBC's assertion of its own uncollectible rate as "uncontroverted". This simply is not the case, as Sage has argued throughout the proceeding that SBC has failed to provide the foundation necessary to support the claim. In fact, Sage filed a

Motion to Strike portions of SBC's prefiled testimony presenting the "uncontroverted" claim of 10-20% uncollectible rate. As explained in that Motion, SBC has utterly failed to provide the Commission with a single piece of documentation or other evidence that would serve as a foundation for the claim. *See*, generally, Sage Telecomm Inc.'s Motion to Strike, filed on October 21, 2003. For the same reason the PAD rejected SBC's purported "industry average" uncollectible rate, the Commission must also reject SBC's purported uncollectible rate. Failure to do so leaves the PAD with an internally inconsistent analysis, and results in a finding not supported by the record.

Finally, the PAD explains as its basis for adopting SBC's purported 10-20% uncollectible rate SBC's claim that it "bills its own customers for [both] SBC ABS … and … ABS received from other CLECs and ILECs." PAD, at p. 17. The PAD explains that this fact shows that SBC has not achieved its collection rate by controlling both ends of the ABS traffic. Again, this analysis is simply not supported by the record in this proceeding. The PAD ignores the actual evidence of record detailing the miniscule amount of ABS traffic the CLECs actually submit to SBC for billing and collection. It is undisputed that the actual evidence shows that exchange of ABS records between the UNE-P CLECs like Sage and SBC is so lop-sided that it causes one to question whether the service is truly reciprocal. For instance, in August 2003, just in Illinois, the total ABS charges billed ***to UNE-P carriers by SBC*** and for which SBC seeks to have the UNE-P carrier be financially liable was in excess of **$xxxxxx**. Tr., at p. 396; Sage Cross Ex. 6P. At the same time, in August 2003, the reciprocal total ABS charges billed ***to SBC by the UNE-P carriers*** was just **$xxx**, or a mere **xxxxxxxxxx%** of the total amount of ABS charges billed to the UNE-P CLECs by SBC! *Id*., Sage Cross Ex. 6P. SBC's own witness Ms. Burgess acknowledges the numbers on cross examination:

Q. So the dollar value of traffic that SBC is asking CLEC's to bill is in excess of **$xxxxxxx** as the numbers reflect there, but the dollar value that SBC is being asked to bill, at least in August of 2003, is less than **$x**?
A. That's a correct statement.

Tr., at pp. 396-397. Thus, SBC is asking the CLECs like Sage to be financially responsible for and guarantee an amount in excess of **$xxxx** worth of SBC ABS charges a month, while SBC is only forced to be responsible for and guarantee the CLECs ABS traffic in an amount that would not even cover the cost of a matinee movie. This evidence is certainly at odds with the conclusion in the PAD, nor does the PAD provide any guidance as to why it discarded the evidence.

Further, the evidence also demonstrates that roughly **xx %** of the ABS traffic at issue in this proceeding are collect calls. SBC's own witness has admitted on cross examination that "between **xx and xx %** of those collect calls originate from an inmate facility, most of which would be SBC's …". Tr., at pp. 380-381, 395; Sage Cross Ex. 2P. Thus, SBC's inmate facilities could be responsible for up to **xxxx%**[9] of all collect calls made, but the PAD would force Sage to be responsible for 65% of the revenue associated with those calls that terminate on Sage end users. In light of the fact that close to **xx%** of the ABS calls made stem from inmate facilities and that SBC's own witnesses admit that most of those inmate facilities are owned and operated by SBC, the PAD's conclusion that Sage should share responsibility for the ABS charges is wholly without merit and unsupported by the record. The record amply demonstrates that SBC is in fact the cause of an overwhelming majority of the ABS traffic according to its own witnesses.

Despite this uncontroverted evidence, the PAD still relies on SBC's claim that SBC has not achieved its purported collection rate by controlling both ends of the ABS traffic. As the

[9] **xx% x xx% = xxx%**

evidence demonstrates, such reliance is simply not consistent with the actual evidence in the record. Further, all of this record evidence demonstrating that SBC is responsible for most of the ABS traffic (and the related ABS charges) is ignored in the PAD. Rather than rely upon the actual evidence in the record, the PAD blindly accepts SBC's purported uncollectible rate for ABS traffic as the basis for adopting SBC's proposed ABS Appendix. The PAD's reliance on this purported uncollectible rate, however, is unfounded and unsupported in the record. As such, the conclusion must be rejected if the Commission hopes to adopt an order that can sustain judicial scrutiny.

- In light of Sage's proposed language in Exception 2 above, if adopted by the Commission, no further language is necessary. Sage would suggest that the Commission merely delete the language in the PAD from the top of page 13 through the end of the section on page 19 and use the language that Sage proffered in Exception 2 above.
- If the Commission determines that it is appropriate to adopt a full ABS Appendix in the ICA, Sage recommends that the Commission strike the language in the PAD starting on the top of page 13 and going through the end of the section on page 19. Sage recommends that the language be replaced with the following:

> To determine the specific allocations, terms and conditions that will govern ABS traffic, we turn to the parties' proposed appendices to the ICA. Sage's proposed Appendix is a mark-up of SBC's proposed Appendix, and now includes Option 1 of the latter appendix, because that option has been revised to address certain Sage objections. Sage Init. Br. at p. 5. Before the addition of SBC's Option 1, Sage's proposed Appendix contained two provisions, both of which we find appropriate in this case.
>
> Under Sage Option 1, SBC would directly bill Sage end-users for ABS charges, using customer information provided for a fee by Sage. We have already noted SBC's and Staff's concerns that direct billing to Sage's local exchange customers will sow customer confusion. We have also already noted SBC's objection about additional billing duties and costs. Nevertheless, the Commission observes that since any telecommunications customer can call any other (absent blocking), every carrier and customer has to address the resulting billing (and billing cost) responsibilities associated with such universal interconnectivity. Moreover, new carriers regularly enter the

telecommunications marketplace, and existing carriers exit, thereby creating billing and billing cost consequences for other carriers.

Consequently, we do not embrace the general proposition that carriers and customers are typically confused by charges from diverse carriers (whether on a single bill from their LEC or on separate bills from different providers). First, as we discussed above, it is clear that, for purposes of ABS calls, SBC and the Sage end user have entered into a contractual agreement related to that call. It follows, then, that the end user should expect or foresee to receive a bill from SBC related to that contract. Nor do we find that, as a general proposition, carriers' direct billing costs are exceptional, as SBC has failed to provide any evidence to demonstrate what its increased billing costs will be for direct billing. Therefore, we find that direct billing by SBC as proposed by Sage should be included in the Sage-SBC ICA.

Similarly, we find that sage Option 2 is appropriate as well. Under that option, Sage is able to keep up to 50% of the ABS charges that it collects on behalf of SBC. First, we agree with Sage, as we have previously held, that Sage should be shielded from any financial responsibility related to SBC's ABS services. Further, we find that this option provides Sage with the proper incentive to robustly go after end users who fail or refuse to pay for ABS calls (thus, keeping its collection rate high), while still allowing SBC to receive revenues related to its services. Rather than penalizing Sage by forcing it to be financially liable for SBC's revenues related to a service provided by SBC, we find it appropriate to reward Sage when it collects SBC's revenues by allowing it to keep a part of what it collects. In short, we prefer the carrot rather than the stick.

Turning to SBC's proposed Appendix terms, as discussed, Sage has already agreed to incorporate SBC Option 1 into its proposed ABS Appendix. Thus, the blocking provisions in SBC Option 1 offer a reasonable solution to the problems arising from ABS uncollectibles.

SBC's other two options are a bit of a different story. Both options impose financial liability on Sage for revenues related to services provided by SBC. The record is clear, however, that Sage has no role in the completion of the ABS call, and should not be forced to be liable for the revenues associated with that call. It is clear from our review of the evidence that Sage has no role whatsoever in the marketing, solicitation, rating, tariffing, offer, acceptance or completion of the ABS traffic at issue. Rather, as Sage points out, the evidence indicates that it is SBC who performs such functions. In short, the ABS call is originated on an SBC phone by a customer using SBC's ABS calling services, is run through the SBC operator services and the SBC network, is rated at SBC's tariffed rates and passed directly through to the terminating party, who then authorizes the call to the SBC operator. Sage is never consulted or even notified of the call. In fact, it is undisputed in the record that Sage is not even made aware of the ABS call until well after both parties have hung up, SBC has forwarded the Daily Usage Feed to Sage and Sage has processed its contents. Sage Ex. 1.0, at p. 20 (Timko Direct). Further, SBC admits on cross that it does not consult with Sage to get its approval for the ABS charge either before, during or after the call. Tr., at p. 405. As such, much like the Texas Commission we find that it is SBC who should face the liability for those charges.

Initially, we must discard SBC's assertion that it does not have a business relationship with the Sage end user who accepts the ABS call. This simply is not the case. As Sage points out, SBC in fact has a contractual relationship with that end user.

SBC offers to the end user to terminate the ABS call in exchange for the end users agreement to pay SBC for the service; the end user agrees to those terms; SBC terminates the call. It is clear there exists all of the necessary terms of a contract between SBC and the end user. It is also clear that Sage is not a party to that contract nor is even aware that such a call exists until well after the call is terminated, which further supports our finding that Sage should not be held financially liable for SBC's ABS charges.

In support of its proposed ABS Appendix, SBC attempts to make claims regarding what it purports to be Sage's uncollectible rate in other jurisdictions, SBC's uncollectible rates, and what SBC claims to the industry standard for uncollectibles. However, SBC failed to provide this Commission with any evidence, documentation or other foundation for any of these assertions. We agree with Sage that we are bound by the requirements of the Illinois Administrative Procedures and our own rules, which require us to make our findings based upon the record evidence before us. "[T]he findings of such administrative agency must be based on facts established by evidence which is introduced as such …" *Wheeler v. County Board of School Trustees of Whiteside County*, 210 N.E.2d 609, 610 (Ill. Ct. App., 3rd Dist, 1965). As SBC has failed to provide any actual evidence in support of its claims, the PAD cannot rely upon the assertions in order to reach a finding of fact or law. SBC's failure to provide such basic foundation for these assertions precludes us from giving them any weight.

The evidence before us does, however, indicate the negative impact on Sage if we were to impose financial liability on it for SBC's ABS revenues. For instance, it is undisputed that such an imposition will have serious impact on the financial wherewithal of Sage. *See*, Sage Ex. 1.0, at p. 27-29 (Timko Direct). The evidence shows that forcing Sage into being financially liable to SBC will force Sage to have to pay an extraordinary amount of cash to SBC up front, which will obviously have a negative affect on Sage's cash flow position. *Id*., at p. 27. Sage may not be able to collect these charges, particularly those that are very high, or obtained by persons that are no longer Sage's customers. Even for those amounts that Sage is able to collect, Sage would not receive those monies until after Sage has been required to pay SBC's invoice for the full amount. Thus, again, there will be a negative cash flow to Sage. The bottom line is that making Sage liable for SBC's Incollect charges forces Sage to subsidize SBC's customers and its business deals with third party carriers and their affiliates. Further, the evidence shows that SBC invoices are shown as liabilities on Sage's books, for which Sage will likely not be able to recover 100% from the end-use customers. *Id*. As such, Sage will have to show the liability as part of its income statement that it uses to secure financing and investors. Because of the time delay in recouping incollect charges versus the deadline for payment to SBC, there will be a significant detrimental impact to Sage's audited financials such as revenues and margin percentages, negative cash flow, false receivable balances (since Sage may never recover some of the incollect charges that it would be forced to pay SBC under an invoice), and bad debt ratios. We find these financial concerns should no longer be an issue due to our decision to limit Sage's role to that of SBC's billing and collection agent only, and not financially liable for SBC's revenues.

For these reasons, we reject SBC's proposed Options 2 and 3. Accordingly, the Sage–SBC ICA should include an appendix consisting of Sages proposed Appendix, supplemented by SBC's Option 1.

IV. SAGE EXCEPTION 4 (p. 25)

IT IS APPROPRIATE TO ALLOW THE PARTIES TO REVIEW THE TERMS OF THE FINAL ORDER BEFORE MANDATING THAT THE PARTIES SUBMIT IT FOR APPROVAL.

The PAD holds that the parties must file within 15 days of the date of service of a final arbitration order the complete interconnection agreement for approval by the commission. PAD, at p. 25. As a matter of fairness, Sage believes that the parties should have an opportunity to review and evaluate the final terms of the Commission's decisions before being forced to be bound by those terms. The ICA is, after all, a contract between the two parties the terms of which will govern the business relationship for a number of years. The parties should have the option of either submitting the agreement for approval or not submitting the agreement for approval if the agreement imposes terms that the party cannot accept.

As such, Sage recommends the following changes to the paragraph on Page 25 of the PAD beginning with "Third, …" making it read as follows:

> Third, pursuant to subsection 252(c)(3), the Commission must "provide a schedule for the implementation of the terms and conditions by the parties to the agreement." Therefore, the Commission directs that the parties file, within 15 calendar days of the date of service of this arbitration decision, notice of acceptance of the terms of the final interconnection agreement adopted herein. In the event that the both parties are accepting of the terms contained herein, then the parties shall file a joint petition for approval within 15 calendar days of the last notice of acceptance filing. If a party determines that it will not accept the terms contained herein, then the interconnection agreement need not be submitted for approval."

V. CONCLUSION

WHEREFORE, in light of the foregoing, Sage respectfully requests this Commission reject the conclusions reached by the Arbitrator in his PAD, and to enter an order consistent with the Texas and Michigan Commissions finding that ""[ABS] matters over the UNE platform should be addressed in a separate billing agreement between parties and should not be incorporated into an interconnection agreement**."** *Texas Revised Arbitration Order*, at p. 212. If the Commission determines otherwise, Sage requests that the Commission adopt Sage's proposed language attached as Exhibit 2 to the Petition and discussed herein, which places Sage in only the role of Billing and Collection agent for SBC (Article XXVII, Section 27.16.3), and not be forced to be financially responsible for all of SBC's and third party's ABS charges when the end user fails to pay the charge (Article VI, Section 6.3.4.1).

The record simply does not support a determination that SBC's proposed ABS Appendix should be adopted. The PAD's conclusions ignore mounds of evidence that amply demonstrates that Sage has no part in the solicitation, offer, acceptance, transmission, rating or tariffing of the ABS call and its related charges. In short, the ABS call is a contract entered into between SBC and the end user, a contract to which Sage is neither a party nor a beneficiary. As a party to the contract, it is SBC, not Sage, that should be held financially liable for a product that it offers. The record evidence also amply demonstrates that the terms adopted by the PAD in SBC's ABS Appendix are inconsistent and far less favorable than billing and collection agreements entered into between Sage and other carriers, as well as the billing and collection agreements entered into between SBC and other third parties.

As such, the Commission must reject the terms contained in SBC's proposed ABS Appendix outright. If the Commission determines that ABS billing and collection should be

included in this agreement, then the Commission must adopt Sage's proposed ABS Appendix (attached to the petition as Exhibit 3), with the only modification being the addition of SBC's revised "Option 1" as proposed in SBC's Revised Ex. 1.0.

Respectfully submitted,
SAGE TELECOM, INC.

_____
By: One of Its Attorneys

Henry T. Kelly
Joseph E. Donovan
333 West Wacker Drive, Suite 2600
Chicago, Illinois 60606
(312) 857-7070
(312) 857-7095 facsimile
HKelly@kelleydrye.com
Jdonovan@kelleydrye.com